

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD MCELVEEN,)
)
 Claimant,)
)
 v.)
)
 EXECUTIVE PLUMBING, LLC,)
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 Employer,)
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 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 04-507011

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed January 31, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise, Idaho, on August 23, 2005. Claimant was present and represented by Reed G. Smith of Boise. Neil D. McFeeley, also of Boise, represented Defendants Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on December 7, 2005.

ISSUES

As agreed upon by the parties at hearing, the issues to be decided are:

1. Whether Claimant’s condition is due in whole or in part to a pre-existing or subsequent injury or disease or cause not work related;
2. Whether Claimant is entitled to additional medical care;

3. Whether Claimant is entitled to additional temporary total disability (TTD) benefits and, if so, whether such benefits should be suspended pursuant to Idaho Code § 72-403;
4. Whether Claimant is entitled to permanent partial disability (PPD) benefits, and the extent thereof;
5. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;
6. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Surety's wrongful denial of benefits;
7. Whether both parties are entitled to reimbursement of certain benefits; and
8. Whether Claimant is guilty of making false statements to obtain benefits within the meaning of Idaho Code § 72-801.

CONTENTIONS OF THE PARTIES

Claimant contends that as a result of an injury to his right knee, he is precluded from following a profession he "loved," plumbing, and is entitled to PPD of 24% of the whole person above his 3% whole-person PPI. Further, Surety's payment of TTD benefits during Claimant's period of recovery from his knee surgery has been sporadic and he is owed additional benefits as well as attorney fees for Surety's unreasonable conduct. Finally, Claimant's vocational evidence is un rebutted and Surety had no reason not to pay PPD benefits as outlined by his vocational expert and such failure to pay provides another reason to award attorney fees.

Defendants contend that Claimant is unable to explain his accident but there is no evidence that an accident did not occur so they accepted the claim and began paying benefits. Nonetheless, Claimant's injury to his knee was minor, as was his surgery, and Claimant's post-surgery narcotic seeking behavior and at least two subsequent knee injuries has interfered with his lackluster return-to-work efforts. Further, Claimant has lied to his physicians and his

vocational expert regarding his past medical history, past vocational limitations, work history, and educational history so as to make their opinions suspect. Moreover, Claimant was overpaid TTD and medical benefits and should be required to repay them and he is not entitled to any PPD benefits above his PPI. Finally, Defendants have acted reasonably in all aspects of their handling of this claim and Claimant is not entitled to an award of attorney fees. Defendants' position was summarized in their post-hearing brief: "Defendants assert that the Referee should deny Claimant any benefits based on his highly improper conduct throughout the course of this workers' compensation claim." Defendants' Post-Hearing Brief, p. 4.

Claimant takes issue with Defendants' ". . . malicious attack on his character and veracity" and cites to the following adage, "if you have the facts, argue the facts. If you have the law, argue the law. If you have neither, just argue." Claimant's Reply Brief, p. 2. Claimant did not intentionally mislead anyone with his failure to remember all his past medical problems; Defendants spent 17 pages of their brief just summarizing Claimant's past medical history so Claimant should not be expected to remember each and every medical problem he has had in his life. Further, the two subsequent knee injuries to which Defendants refer did not involve Claimant but someone else. Moreover, the medical evidence does not support Defendants' position that apportionment is warranted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Douglas Crum presented at the hearing.
2. Claimant's Exhibits 1-11, 13, and 15-16, admitted at the hearing.
3. Defendants' Exhibits 1-14 admitted at the hearing.

4. The post-hearing deposition of James M. Johnston, M.D., taken by Defendants on September 15, 2005.

All objections made during the taking of Dr. Johnston's deposition are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 31 years of age, unemployed, and resided in Pocatello at the time of the hearing.

2. At the time of the subject accident/injury on March 23, 2004, Claimant had been working for Employer as an apprentice plumber for less than a week when he fell into a trench and hit his right knee on a concrete footing.

3. Employer took Claimant home; he also fired him. Later that evening, Claimant presented to Saint Alphonsus Regional Medical Center Emergency Department. The on-call physician was concerned about an anterior cruciate ligament injury. He referred Claimant to James M. Johnston, M.D., the on-call orthopedic surgeon.

4. Claimant first saw Dr. Johnston on March 29, 2004. Upon examination, Dr. Johnston concluded that Claimant probably suffered a partial lateral meniscus tear rather than an anterior cruciate ligament tear and ordered an MRI. Dr. Johnston took Claimant off work.

5. The MRI of Claimant's right knee was accomplished on April 15, 2004. It showed, "moderately severe changes of chondromalacia patella are present as detailed in the body of the report. No meniscal tear or ligamentous disruption is identified." Claimant's Exhibit 2, p. 1004.

6. Claimant returned to Dr. Johnston on April 22, 2004. At that time, Dr. Johnston read the April 15 MRI to reveal “very severe patellar articular damage.” *Id.*, p. 1005. Dr. Johnston noted that part of his patellar damage was chronic and part acute. He so opined because of his belief that Claimant’s condition was asymptomatic prior to his fall. However, Claimant failed to inform Dr. Johnston of his previous bilateral knee problems. In any event, Dr. Johnston elected to continue physical therapy and other conservative measures before deciding on surgical intervention. He also suggested that Claimant might want to consider a different career than plumbing in the long term.

7. When conservative treatment proved ineffectual, Dr. Johnston recommended arthroscopic evaluation with lateral retinacular release and sought Surety approval; Surety wanted a second opinion.

8. At Surety’s request, Claimant saw Timothy E. Doerr, M.D., an orthopedic surgeon, on July 13, 2004. Claimant informed Dr. Doerr of a prior right shoulder surgery, but no other past medical history. Dr. Doerr noted, “I would concur that a significant portion of Rick’s anterior knee symptoms are likely secondary to the direct impact that he sustained on his anterior patella resulting in injury to his articular cartilage.” Claimant’s Exhibit 5, p. 6002. Dr. Doerr concurred in the opinion of Dr. Johnston that a right knee arthroscopic chondroplasty and lateral release was a reasonable treatment option.

9. On July 23, 2004, Dr. Johnston performed a right knee arthroscopic lateral retinacular release. In his deposition, Dr. Johnston described the procedure as:

The lateral retinaculum is a ligament on the side of the kneecap that holds the kneecap in place. In this case, the patellar entrapment or lateral patellar compression syndrome is from the lateral retinaculum being too tight, so we release that. We cut that ligament or a portion of it to loosen the kneecap.

Dr. Johnston Deposition, pp. 14-15.

Dr. Johnston also “smoothed out” the lesions on the underside of the kneecap as best he could.

10. Dr. Johnston testified that Claimant’s post-operative course was “confusing:”

Follow-up was very spotty in that he was off and on in the Boise area, off and on in Pocatello, off and on in Salt Lake for reasons I don’t understand. We had multiple phone calls from him over three months about pain medication, about re-injuries.

Initially, he had good results from a pain relief standpoint. Subsequently, he had complaints of increasing pain, so it was definitely confusing to me from that standpoint.

Dr. Johnston Deposition, p.18.

11. On October 5, 2005, Dr, Johnston assigned a 3% whole person PPI rating based entirely on a 2 cm quadriceps atrophy.

12. At Surety’s request, Claimant saw Stanley J. Waters, M.D., Ph.D., on May 16, 2005. Dr. Waters noted that Claimant initially improved post-surgery, but continues to have intermittent pain, swelling, and decreased strength and endurance in his lower extremity. Claimant informed Dr. Waters that he had no prior history of right knee pain or injury. Dr. Waters diagnosed chondromalacia of the patellofemoral joint of the right knee directly related to the mechanism of Claimant’s March 23, 2004, accident and injury. Dr. Waters opined that Claimant might benefit from a series of Synvisc injections into his right knee and a self-directed exercise program. Dr. Waters found Claimant to be at maximum medical improvement and concurred with Dr. Johnston’s 3% whole person PPI rating.

DISCUSSION AND FURTHER FINDINGS

Pre-existing or subsequent conditions:

Defendants contend that Claimant suffered a prior right knee injury to the extent that at least a portion of his current condition should be apportioned to his pre-existing condition. Idaho

Code § 72-406 provides that “if the degree or duration of disability resulting from an industrial injury . . . is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.”

13. Dr. Johnston testified that a portion of Claimant’s current right knee problem was chronic and a portion was acute. However, he did not quantify in any fashion what “portion” was pre-existing and what “portion” was not. There is no medical evidence that any prior problem Claimant might have experienced with his right knee resulted in any physical impairment. Further, and more importantly, Dr. Johnston did not apportion any of his 3% whole person PPI rating to pre-existing conditions. The Referee finds that apportionment pursuant to Idaho Code § 72-406 for pre-existing conditions is not appropriate.

14. Defendants also argue that Claimant was involved in at least two subsequent accidents. As with the problem with the alleged pre-existing conditions, there is no evidence that any subsequent accident, if they indeed occurred, resulted in any physical impairment or increased or prolonged the duration of any disability. The Referee finds that apportioning for subsequent conditions is not appropriate.

Additional medical care:

Idaho Code § 72-432 obligates an employer to provide medical care for an injured worker immediately after an injury and for a reasonable time thereafter.

15. Other than the Synvisc injections recommended by Dr. Waters and apparently accomplished by Claimant’s treating physician in Pocatello, Claimant has presented no medical evidence that he is in need of any further medical treatment. In fact, Dr. Johnston testified that

he is not. Therefore, the Referee finds that Claimant is not entitled to further medical care and treatment for his right knee injury.

TTD benefits:

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg, Id.*

16. Claimant contends that he is entitled to additional TTD benefits from October 26, 2004, through April 5, 2005, a period of 23 weeks or 161 days. He bases this contention on Dr. Johnston's May 18, 2004, chart note wherein he recommends surgery and

notes, “It will take approximately ten months to get maximum benefit from lateral retinacular release.” Claimant’s Exhibit 2, p. 1006. Claimant’s surgery was accomplished on July 23, 2004, and, argues Claimant, the period of October 26, 2004, through April 4, 2005, is within that ten-month period.

Defendants counter that not only is Claimant not entitled to any additional TTD benefits, but that he should reimburse an overpayment or, in the alternative, any additional TTD benefits should be suspended pursuant to Idaho Code § 72-403 because Claimant has refused or failed to seek mentally or physical suitable work.

Defendants terminated TTD benefits and commenced PPI benefits when they received Dr. Johnston’s October 5, 2004, office note wherein he declared Claimant to be medically stable and assigned a 3% whole person PPI rating. Surety received Dr. Johnston’s rating on October 25, 2004. Surety argues that they are entitled to reimbursement for 20 days of TTD payments. The Referee disagrees. In his experience, the Referee recalls that it was common practice for Sureties to either terminate or convert from TTD benefits to PPI benefits **upon receipt** of a medical record declaring medical stability and, perhaps, a PPI rating. It would be unfair to a claimant to have to repay benefits based on a tardy report from a physician, a situation over which the claimant has no control. *See, Cameron v. May Trucking Co., Inc.*, 1992 IIC 0071, 92 IWCD 4669 (1992).

Regarding additional TTD benefits, the Referee is not persuaded that such is warranted in this case. The ten-month “estimate” provided by Dr. Johnston for Claimant to obtain “maximum benefits” from his surgery is not the same as being taken off work, either completely or on light duty. Apparently, Dr. Johnson “revised” his “estimate” in October when he assigned his PPI rating and declared Claimant medically stable.

Surety again paid TTD benefits from April 5, 2005, to June 15, 2005, based on a report from Kenneth E. Newhouse, M.D., a physician in Pocatello to whom Claimant was referred by Dr. Johnston. Dr. Newhouse indicated in an April 5, 2005, office note that Claimant was still experiencing pain subjectively (even though a right knee MRI was essentially normal) and discussed possible further treatment; however, Dr. Newhouse did not take Claimant off work. On July 26, 2005, Dr. Newhouse authored a letter to Claimant's counsel indicating that as of May 5, 2005, (the date of his last visit with Claimant), Claimant was unable to return to his job as a plumber. However, Dr. Newhouse did not indicate that Claimant could not return to work in any capacity. The Referee finds that Claimant has failed to prove he is entitled to additional TTD benefits nor is he required to reimburse any TTD benefits paid pursuant to Idaho Code § 72-403 or otherwise.

PPD benefits:

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the

occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

17. Claimant retained Douglas Crum, a vocational rehabilitation consultant, to assist him with vocational issues. Mr. Crum prepared a report and testified in person at the hearing. Mr. Crum first met with Claimant on February 16, 2005, at which time he took an education and work history. Claimant informed Mr. Crum that he graduated from Highland High School in Pocatello in 1992. This information turned out to be incorrect; Claimant actually received his high school equivalency diploma at Cottonwood while incarcerated in the “Rider” program for an aggravated assault conviction. Claimant also attended Idaho State University in the apprenticeship plumbing program from 1999 until the spring of 2003. He completed the program but has yet to receive his journeyman credentials, as he has not had the opportunity to “test out.”

Claimant's work history consisted of working as a plumber, sales in a plumbing supply store, as a delivery truck driver, as a production line worker, and as a cleanup and construction worker. Claimant informed Mr. Crum that he had a prior right shoulder injury with surgery that resulted in permanent restrictions but that he "rehabilitated himself physically" and the shoulder was no longer a problem and did not interfere with heavy lifting.

Based on his interview with Claimant and a review of certain medical records, Mr. Crum concluded that Claimant had lost access to approximately 26% of his pre-injury Boise area labor market (even though Claimant resides in Pocatello). He calculated Claimant's wage loss at between 18-30% based on his time-of-injury wages of \$15.00 an hour and his post-injury wage range of \$10.49 for warehouse jobs to \$12.24 an hour for delivery truck drivers. Combining the two, Mr. Crum reasoned that Claimant's PPD inclusive of PPI is approximately 24% of the whole person.

Defendants did not retain a vocational expert but utilized cross-examination in an attempt to discredit Mr. Crum's opinions. For example, Claimant did not graduate from Highland High School as he told Mr. Crum and did not attend the ISU program during the time Mr. Crum had indicated. Further, Mr. Crum was not aware that the restrictions Dr. Wathne assigned for Claimant's right shoulder were more stringent than what Claimant told him. Mr. Crum was also unaware that Claimant's CDL had been suspended for failure to pay child support and had not been reinstated at the time of the hearing. Mr. Crum was also unaware of the extent of Claimant's prior medical history that included a left knee surgery. Mr. Crum testified that Claimant would have had some disability from his shoulder injury prior to his right knee injury. Mr. Crum also did not know why Claimant failed to test for his journeyman plumber certificate during the several years after he finished the ISU program.

The Referee shares to some extent Defendants' concerns regarding Mr. Crum's testimony and report. It is clear from the record as a whole that Claimant has been less than forthright with his physicians, Mr. Crum, Defendants, and the Commission. For a period of time, both before and after the subject accident, Claimant persisted in obtaining narcotic pain medications by visiting the Bannock/Portneuf Medical Center Emergency Room¹ and other medical facilities for various ailments. Claimant's treating physician, Dr. Johnston, testified, "Absolutely. In fact, that history which I was not aware of absolutely fits with our experience at the office that he has been narcotic seeking throughout this entire episode." Dr. Johnston Deposition, p. 12.

While this Referee and the Commission are certainly aware that a small number of injured workers develop narcotic dependencies during their course of treatment, nonetheless, such behavior cannot be ignored when assessing the veracity of statements made to medical providers regarding subjective complaints that would warrant a prescription for narcotic pain medications. For instance, Claimant has denied making statements that he re-injured his right knee in a series of dirt bike accidents and an incident where he re-injured his right knee while getting off his horse. He testified that he has not ridden a dirt bike since he was a child and he is allergic to horses and has never ridden one so hospital personnel must have made a mistake in recording that history. The Referee finds that highly unlikely as all of the remaining information contained within the records surrounding those events is, by Claimant's own admission, correct.

The above is not meant to be an exhaustive illustration of how Claimant has failed to demonstrate the forthrightness one would like to see in workers' compensation proceedings. His deposition is rife with instances where he "does not remember" or is intentionally evasive to even the most innocuous questions. He failed to mention prior knee injuries to Dr. Johnston even though Dr. Johnston testified that would be important for him to know. Dr. Johnston also

¹ Defendants' Exhibit 6 are the medical records from Bannock/Portneuf Medical Center and consists of 548 pages.

testified that Claimant's subjective complaints have always been out of proportion to his objective findings and his current pain complaints are without physical explanation. Thus, any physical restrictions given by any doctor based on Claimant's subjective complaints are suspect.

The physical restrictions that have been given are: Dr. Johnston – no repetitive squatting, climbing, or kneeling, and no lifting over 50 pounds. Dr. Waters – avoid kneeling, crouching, or stooping, and Claimant should be allowed to sit and stand during the day. He, “. . . could clearly work an 8-10 hour day if needed.” Claimant's Exhibit 8, p. 5003. Dr. Newhouse – “It is unclear to me at this time (April 28, 2005) whether he can perform work as a plumber, requiring persistent kneeling and the like. Again, however, I would recommend an ergonomic specialist evaluate him with a functional work capacity in order to determine his specific limitations.” Claimant's Exhibit 7, p. 2006.

Dr. Johnston testified in his deposition as follows regarding what he meant by Claimant's ability to return to work as a plumber:

Q. (By Mr. McFeeley): What do you mean he could return to work as a plumber?

A. What I mean when I make that statement is there's no question that he should be able to get his knee well enough to return to plumbing. However, this is a young guy, 30 years old. I don't think that this knee would last for physical aggressive plumbing work for a 30-year work life span.

However, a lot of times, my recommendation is for people like this that they work themselves into the administrative side of that same business since that's the business they know which many people do. There are very few 65 year old plumbers doing plumbing work. They're all on the management side.

Dr. Johnston Deposition, pp. 16-17.

19. The Referee is persuaded by Dr. Johnston's opinion expressed above. Claimant's restrictions from his right knee injury are minimal and to the extent they are based on Claimant's subjective complaints are unreliable. Mr. Crum's reliance on Claimant's time of injury wage of \$15.00 an hour is not reasonable in that Claimant had only been employed for Employer for

about a week and he did not make anywhere near that amount of money pre-injury. Further, Claimant's expressed "love" for the plumbing profession is undermined by his failure to "test out" regarding his journeyman licensing, his interest at various times in being retrained into small engine repair, and his sporadic employment as a plumber pre-accident. Claimant has failed to demonstrate he could not be employed in the Pocatello area in a manner consistent with his restrictions and pre-injury wages if he were so motivated.² Further, the fact that Claimant has lost his CDL for failure to pay child support will certainly have an impact on his employability that should not be borne by Employer and Surety. The Referee finds that Claimant has failed to prove his entitlement to PPD in excess of his 3% whole person PPI.

Forfeiture of benefits:

Idaho Code § 72-801 provides that a claimant's benefits may be forfeited upon a conviction of the misdemeanor of making false statements for the purpose of obtaining workers' compensation benefits. This statute is inapplicable here in that Claimant has not been found guilty of violating the same.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies or delays payment of benefits. Claimant argues he is entitled to an award of attorney fees for Surety's unreasonably terminating his TTD payments and for not accepting Mr. Crum's unrebutted report regarding PPD benefits. In light of the Referee's findings regarding TTD and PPD benefits, an award of attorney fees is not appropriate.

CONCLUSIONS OF LAW

1. Apportionment pursuant to Idaho Code § 72-406 is not appropriate in this case.

² On November 2, 2005, Defendants were allowed to supplement their exhibits post-hearing to include additional ICRD notes that revealed that on October 13, 2005, Claimant reported that he was employed at Virginia Transformer as a copper winder earning \$9.75 an hour.

2. Claimant is not entitled to further medical care.
3. Claimant is not entitled to further TTD benefits.
4. Defendants are not entitled to reimbursement of benefits.
5. Claimant is not entitled to PPD benefits in excess of his 3% whole person PPI.
6. Claimant is not subject to the forfeiture of benefits pursuant to Idaho Code § 72-801.
7. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __23rd__ day of ____January____, 2006.

INDUSTRIAL COMMISSION

____/s/_____
Michael E. Powers, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31st__ day of __January__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

REED G SMITH
942 MYRTLE ST
BOISE ID 83702

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

_____/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD MCELVEEN,)	
)	
Claimant,)	IC 04-507011
)	
v.)	
)	ORDER
EXECUTIVE PLUMBING, LLC,)	
)	Filed January 31, 2006
Employer,)	
)	
and)	
)	
STATE INSURANCE FUND,)	
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Surety,)	
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Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Apportionment pursuant to Idaho Code § 72-406 is not appropriate in this case.
2. Claimant is not entitled to further medical care.
3. Claimant is not entitled to further total temporary disability benefits.
4. Defendants are not entitled to reimbursement of benefits.

5. Claimant is not entitled to permanent partial disability benefits in excess of his 3% whole person permanent partial impairment.

6. Claimant is not subject to the forfeiture of benefits pursuant to Idaho Code § 72-801.

7. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __31st__ day of ____January____, 2006.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
James F. Kile, Commissioner

____/s/_____
R. D. Maynard, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31st__ day of ____January____, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

REED G SMITH
942 MYRTLE ST
BOISE ID 83702

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

____/s/_____

ge